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No. 07-103

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SUPREME COURT, U.S.

In The Supreme Court of the United States

RICKIE L. REBER, TEX WILLIAM ATKINS, STEVEN PAUL THUNEHORST & C.R.,

Petitioners,

vs.

STATE OF UTAH,

Respondent.

On Petition For Writ Of Certiorari To The Utah Supreme Court

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should this Court consider three factual issues governed by state law that were not decided by the Utah Supreme Court and are irrelevant to its decision?

2. Should this Court consider two issues related to the Ute Partition Act that are not dispositive and were not decided by the Utah Supreme Court?

3. Should this Court engage in further review of a correct ruling from the Utah Supreme Court that is based on well-settled federal law?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT 1

REASONS FOR DENYING THE WRIT 7

I. The first three questions Petitioners present – involving interpretation of a state statute governing mistake of law, elements of an offense charged in juvenile court, and alleged judicial bias – raise matters of state law that are irrelevant to the question decided by the Utah Supreme Court, have not been ruled upon by any Utah appellate court, and do not present recurring issues of general importance 8

II. The two questions Petitioners present related to the Ute Partition Act are not dispositive of the jurisdictional issue before this Court and have not been ruled upon by any Utah appellate court 13

III. The decision of the Utah Supreme Court is correct 15

CONCLUSION 18

APPENDIX

Trial court's Ruling on Jurisdiction ..... App. at 1-10

Trial court's Modified Findings of Fact and Conclusions of Law ..... App. at 11-21

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Adarand Const., Inc. v. Mineta, 534 U.S. 103 (2001) 12

Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977) 4, 17

Duignan v. United States, 274 U.S. 195 (1927) 12

Montana v. United States, 450 U.S. 544 (1981) 4, 17

National Collegiate Athletic Ass'n v. Smith, 525 U.S. 459 (1999) 12

United States v. Reading, 228 U.S. 158 (1913) 11

Solem v. Bartlett, 465 U.S. 463 (1984) 3, 10, 15

Stone v. So. Ill. & M. Bridge Co., 206 U.S. 267 (1907) 8

Timpanogos Tribe v. Conway, 286 F.3d 1195 (10th Cir. 2002) 9

United States v. Felter, 752 F.2d 1505 (10th Cir. 1985) 16

United States v. Reading, 228 U.S. 158 (1913) 11

United States v. Rogers, 45 U.S. 567 (1846) ..... *passim*

United States v. Von Murdock, 132 F.3d 534 (10th Cir. 1997), *cert denied, Von Murdock v. United States*, 525 U.S. 810 (1998) 6, 8, 9, 14, 16

Ute Indian Tribe v. Utah, 114 F.3d 1513 (10th Cir. 1997) 9, 10

White Mountain Apache Tribe v. Arizona Dep't of Game & Fish, 649 F.2d 1274 (9th Cir. 1981) 4

TABLE OF AUTHORITIES – Continued

Page

STATE STATUTES

Utah Code Ann. § 23-20-4 1

RULES

Fed. R. Civ. P. 12(b)(6) 9

Sup. Ct. R. 24(1)(i) 11

STATEMENT

1. *Summary of the Facts.* During the 2002 Utah deer hunt, Petitioner Reber's son, C.R., shot a trophy deer in Indian country with his father's assistance. Pet. App. 2, ¶ 3; R. 584: 157. When conservation officers from the Utah Division of Wildlife Resources stopped Petitioners at a checkpoint, they observed a large buck in Petitioner's truck bed. The deer did not have a state hunting permit, license, or tag attached to it, as required by state law. R. 584: 158.

During the same hunting season, Petitioners Thunehorst and Atkins killed another, smaller deer in Indian country. Similarly, neither of them had a hunting permit.

The parties stipulated that each of the three adult petitioners was 1/16 Indian by blood and that they were not members of any federally-recognized Indian tribe. Resp. App. 1, 13-14.[1]

2. *Summary of the proceedings.* Petitioner Reber was charged with aiding or assisting in the wanton destruction of wildlife, a third degree felony, in violation of Utah Code Ann. §§ 23-20-4(3)(a). Pet. App. 2, ¶ 3. Petitioner C.R. was referred to juvenile court. *Id.* Petitioners Thunehorst and Atkins were charged with aiding or assisting in the wanton destruction of wildlife, a class A misdemeanor, in violation of Utah Code Ann. § 23-20-4(3)(b). *Id.* at ¶ 4.

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[1] The juvenile was 1/32 Indian by blood.

Petitioner Reber filed a motion to dismiss for lack of jurisdiction. R. 12-13. After extensive briefing and several hearings, the trial court denied the motion, upholding state jurisdiction because Petitioner Reber had failed to establish he was Indian for purposes of criminal jurisdiction. Resp. App. 11-21. A jury tried Petitioner Reber and convicted him as charged. R. 505-06, 564. The court ordered a suspended prison term of zero-to-five years, restitution of $4,000 payable to the Utah Department of Wildlife "Stop Poaching" Fund, a fine of $1,250 or 250 hours of community service, and three years of probation with conditions attached. R. 562-65.

Petitioner Reber timely appealed, seeking review of the trial court's pre-trial jurisdictional rulings. R. 566-67. The Utah Court of Appeals consolidated Petitioner Reber's appeal with appeals raising identical issues filed by Petitioners Thunehorst and Atkins.[2] The Utah Court of Appeals vacated the convictions, concluding that "the crimes occurred in Indian Country governed by the Ute Tribe. Because the Ute Tribe is the victim, the State does not have jurisdiction." Pet. App. 21, ¶ 13. Having thus held that the State lacked jurisdiction by virtue of the Ute Indian Tribe's status as a victim, the court did not address any other issues raised by Petitioners. *Id.* at 15, n.1.

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[2] Petitioners Thunehorst and Atkins agreed at this juncture to be bound by the outcome of Petitioner Reber's appeal.

The Utah Court of Appeals denied the State's petition for rehearing. Pet. App. 40-41. The State filed a petition for writ of certiorari in the Utah Supreme Court. Petitioners filed a cross-petition. The Utah Supreme Court granted the petitions as to three issues. Two addressed whether the Ute Indian Tribe possessed unfettered regulatory or property interests over all hunting throughout Indian country such that the Tribe would be the victim of any illegal hunting in Indian country. The third addressed whether Petitioners had established they were Indians. Pet. App. 3, ¶ 7. The Court further ordered that the juvenile court case adjudicating Petitioner Reber's son, C.R., be consolidated into this case. *Id.* at ¶ 1.

3. *Utah Supreme Court decision.* Focusing entirely on jurisdiction, the Utah Supreme Court unanimously reversed the Court of Appeals, citing at the outset the undisputed governing principle that "[w]ithin Indian country, state jurisdiction is limited to crimes by non-Indians against non-Indians and victimless crimes by non-Indians." Pet. App. 4, ¶ 9 (quoting *Solem v. Bartlett*, 465 U.S. 463, 465 n.2 (1984) (citation omitted)). The Utah Supreme Court held both that unlawful hunting is a victimless crime and that Petitioners had failed to establish that they were Indians. *Id.* at 4, ¶ 9; 8, ¶19; 11, ¶ 26. Because these Indian country crimes were both victimless and committed by non-Indians, the Utah Supreme Court held, the State properly exercised jurisdiction over Petitioners. *Id.* at 12, ¶ 27.

Petitioners' crimes were victimless. The Utah Supreme Court determined that because Petitioners' crimes were victimless, the Ute Indian Tribe could not be a victim. The Court articulated two reasons underlying this conclusion.

First, the Ute Indian Tribe could not be a victim because it lacked a regulatory interest in Petitioners' unlawful hunting under the factual circumstances of this case. Tribes cannot regulate hunting and fishing by non-Indians on land within the geographical boundaries of Indian country that is not owned by or held in trust for Indians, either individually or as a Tribe. *Id.* at 6-7, ¶¶ 15-16 (citing *Montana v. United States*, 450 U.S. 544 (1981)). Here, Petitioners did not dispute that the crimes occurred on non-Indian-owned land. *Id.* Consequently, lacking any regulatory interest, the Tribe could not be a victim. *Id.* at 7, ¶ 16.

Second, the Ute Indian Tribe could not be a victim because it did not have a property interest in the deer. Indeed, no entity "owns" wildlife in the sense of having an enforceable property interest in wild animals on the hoof. *Id.* at 8, ¶ 17 (citing *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 284 (1977)). This conclusion has been applied explicitly to Indian tribes. *Id.* at ¶ 18 (citing *White Mountain Apache Tribe v. Arizona Dep't of Game & Fish*, 649 F.2d 1274, 1283 (9th Cir. 1981)). Because the Ute Indian Tribe had no protected property interest in wildlife, it could not be a victim by virtue of such an

interest in the deer that were unlawfully shot. *Id.* at 8-9, ¶ 19.

Based on these two rationales, the Utah Supreme Court concluded that, "[o]ther than the wildlife itself, these crimes have no victims." *Id.* at 8-9, ¶ 19.

Petitioners are not Indians. The Utah Supreme Court also held that Petitioners failed to establish they are Indians. *Id.* at 9-12. In *United States v. Rogers*, 45 U.S. 567 (1846), this Court articulated a two-part test for determining Indian status. To claim the status of an Indian, a person must show both that he possessed a sufficient quantum of Indian blood and that he is recognized as an Indian by a Tribe or the federal government. The Utah Supreme Court held that Petitioners had failed to meet both of these required prongs. *Id.* at 9, ¶ 21.

The first prong of the *Rogers* test, requiring a showing that Petitioners possess a significant quantum of Indian blood, was dispositive. *Id.* Petitioners stipulated to possessing only 1/16 Indian blood. Resp. App. 1, 13-14. The Utah Supreme Court rejected petitioners' claim of Indian status because no court has held 1/16 Indian blood sufficient under *Rogers*. Pet. App. 9, ¶ 22. Moreover, even assuming that 1/16 Indian blood would suffice, the Court also rejected Petitioners' claim because the ancestors through whom they claimed Indian blood had been listed on the Ute Partition Act final termination roll. *Id.* at 9-10, ¶ 23. Petitioners, as descendants of terminated Indians, thus had zero Indian blood for purposes of

recognition by the federal government. *Id.* (citing *United States v. Von Murdock*, 132 F.3d 534, 536 (10th Cir. 1997). Failing the first prong of *Rogers* for either of these two articulated reasons defeated Petitioners' claim of Indian status.

While the Utah Supreme Court need not have reached the second prong of the *Rogers* test, requiring recognition as an Indian by a tribe or society of Indians or by the federal government, it nonetheless chose to do so. *Id.* at 9, ¶ 21. The Court noted that the Uintah band is not recognized as a tribe by the federal government and, further, that the Uintah band has no existence apart from the federally-recognized Ute Tribe. *Id.* at 10-11, ¶ 24 (citing *Von Murdock*, 132 F.3d at 541). Because under federal law the Uintah band exists only within the Ute Tribe and because Petitioners concede they are not members of the Ute Tribe, their claim also fails under the second prong of *Rogers*. *Id.* at 11, ¶ 25 .

Thus, both because the Ute Indian Tribe is not a victim and because Petitioners failed to establish they are Indians within the meaning of federal law, the State had jurisdiction. Accordingly, the Utah Supreme Court reversed the decision of the Utah Court of Appeals and reinstated the convictions. *Id.* at 12, ¶ 27. It did not, however, remand the case to the court of appeals for consideration of the other issues Petitioners had raised, but which the court of appeals had not reached. Petitioners did not file a petition for rehearing to request a remand for consideration of

those issues. Instead, they filed a Petition for Certiorari in this Court.

REASONS FOR DENYING THE WRIT

The only issue decided by the Utah Supreme Court in this case was whether the State of Utah could exercise jurisdiction over hunting crimes committed within the geographic boundaries of Indian country. Yet none of the five questions presented in the Petition for Writ of Certiorari has any bearing on that determination. Rather, Petitioners seek review of non-dispositive questions unaddressed by any Utah appellate court.

The first three questions presented by the Petition are fact-specific matters of state law that are irrelevant to the jurisdictional question, have not been addressed by any Utah appellate court, and raise no recurring issues of general concern.

The fourth and fifth questions presented raise issues of federal law related to the Ute Partition Act that are unnecessary to determining whether Petitioners are Indian for purposes of criminal jurisdiction in Indian country. That is, regardless of how a court might construe the Ute Partition Act, Petitioners nonetheless lack Indian status under the dispositive *Rogers* test. Moreover, they have not preserved any grounds for challenging the Utah Supreme Court's holding that they are not Indian under *Rogers*.

Finally, the decision of the Utah Supreme Court is correct as a matter of law, relying on well-settled precedent from this Court and from the Tenth Circuit.

I. The first three questions Petitioners present – involving interpretation of a state statute governing mistake of law, elements of an offense charged in juvenile court, and alleged judicial bias – raise matters of state law that are irrelevant to the question decided by the Utah Supreme Court, have not been ruled upon by any Utah appellate court, and do not involve recurring issues of general importance.

The first three questions Petitioners present all turn on routine applications of state law that are irrelevant to the question decided by the Utah Supreme Court in this case. Moreover, no Utah appellate court has ruled on any of these questions. None is appropriate for certiorari review.

First, Petitioners claim that, in determining intent, a jury should have been permitted to assess the reasonableness of their reliance on two federal cases. *See* Pet. 12-14. This question refers to a trial court ruling interpreting a state statute governing mistake of law as a defense. *See* Pet. App. 31-37, 47. Whether the trial court correctly interpreted a state statute presents a narrow and case-specific question of state law, wholly lacking in implications of broad scope. *See Stone v. So. Ill. & M. Bridge Co.*, 206 U.S. 267, 272-73 (1907) (declining to consider question of state law).

Moreover, the two cases on which Petitioners assert they reasonably relied wholly fail to support their positions. *Timpanogos Tribe v. Conway*, 286 F.3d 1195 (10th Cir. 2002), was an interlocutory appeal from the denial of the state's motion to dismiss under rule 12(b)(6), Federal Rules of Civil Procedure. *Conway*, 286 F.3d at 1198. In that context, a panel of the Tenth Circuit determined that the Timpanogos Tribe "may establish federal question jurisdiction in asserting its hunting rights" even though it was not a federally-recognized tribe. Pet. App. 65. This ruling merely permitted the suit to continue; the court granted no other relief at that time. *Id.* at 63-66. Nowhere does the case suggest that alleged Uintah band members can hunt without a state permit on the land at issue here. Petitioners fail to explain how or why a ruling on a motion to dismiss caused them to reasonably believe that they were exempt from state law forbidding hunting without a state permit.

The other case on which Petitioners purportedly relied is *Ute Indian Tribe v. Utah*, 114 F.3d 1513 (10th Cir. 1997) ("*Ute V*"); Pet. App. 48-57 (excerpt only). *Ute V*, however, is a boundary diminishment case that determined which lands within the Uintah Valley Indian Reservation were no longer Indian country.[3] *Ute V* did not change the Indian country

[3] The Uintah Valley reservation forms the northern section of what is today the Uintah and Ouray reservation. The Uncompahgre reservation forms the southern section. *See* Pet. App. 17, ¶ 8 (quoting *Von Murdock*, 132 F.3d at 540). *Ute V* addresses

(Continued on following page)

status of the National Forest lands and the Uncompahgre reservation, where Petitioners committed their crimes. *Id.* at 1515; R. 50; R. 584: 191; Resp. App. 11-13. To the extent that *Ute V* has any relevance to this case, it stands for the undisputed proposition that the land on which Petitioners committed their crimes lies within Indian country. As was true of *Conway, Ute V* nowhere suggests that alleged Uintah band members can hunt without a state permit on the non-Indian-owned land at issue here. Consequently, any reliance by Petitioners on *Ute V* would have been unreasonable.[4]

The second issue raised by Petitioners – whether the juvenile court properly considered all elements of the offense with which the juvenile was charged – presents another fact-specific question not ruled upon

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diminishment of Indian country within the northern section only.

[4] The Utah Supreme Court did express concern with the following passage from *Ute V*: "Under our approach, the Tribe and the federal government retain jurisdiction over all trust lands, the National Forest Lands, [and] the Uncompahgre Reservation. . . ." Pet. App. 56 (quoted in Pet. App. 5-6, ¶ 12). This language must be read in the context of the language that follows it: "Indian country extends to all trust lands, the National Forest lands, [and] the Uncompahgre. . . ." Pet. App. 57. Together, the fair import of these statements is that trust lands, National Forest lands, and the Uncompahgre remain Indian country, governed by the general jurisdictional rule that, unless the perpetrators and any victims are non-Indian, the tribe or federal government will have jurisdiction. *See Solem*, 465 U.S. at 465 n.2. That is precisely how the Utah Supreme Court ultimately read that language from *Ute V*.

by the Utah Supreme Court. *See* Pet. 14. Moreover, Petitioners have inadequately briefed the issue, both in the Utah appellate courts and now in their Petition for Certiorari. *See* Sup. Ct. R. 24(1)(i). Petitioners present their argument in one conclusory sentence, devoid of record citations, wholly failing to articulate their specific argument or any implications of a general or recurring nature that would compel certiorari review. *See* Pet. 14. This claim does not warrant certiorari review by this Court. *See United States v. Reading*, 228 U.S. 158, 160 (1913) (declining to reach inadequately-briefed issue).

Finally, the third issue – whether the trial judge was biased against the adult petitioners – presents yet another fact-based question of state law. *See* Pet. 14. Petitioner Reber filed a motion to disqualify the trial judge, who correctly certified the matter to the presiding judge of the district, as mandated by the Utah Rules of Criminal Procedure. R. 277, 293. The presiding judge denied the motion, describing it as "woefully late," untimely by almost 11 months and unjustified by any good cause. R. 295. Even on the merits, Petitioners' complaint that the trial court maintained it "was under no obligation to follow federal law" is incorrect on its face. Pet. 9. The trial court simply made the unremarkable observation that it was not bound by the rulings of federal courts of appeals. Pet. App. 99-105. Nonetheless, the court consistently applied federal Indian law in explaining the legal rationale underlying its jurisdictional rulings. Resp. App. 2-4, 15-21. Under these circumstances,

there is no conceivable justification for certiorari review by this Court.

Although Utah appellate courts have not ruled on the first three questions presented, Petitioners nonetheless want this Court to consider them. This Court does not typically review questions in the first instance that have not been addressed below, *Adarand Const., Inc. v. Mineta*, 534 U.S. 103, 109-10 (2001); *National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999). This case presents no exceptional circumstances that would warrant departure from that usual practice. *See Duignan v. United States*, 274 U.S. 195, 200 (1927) (explaining that only in exceptional cases will his Court review questions not first ruled upon below).

Had Petitioners wanted a full hearing on these state law issues, they had the opportunity to file a petition for rehearing in the Utah Supreme Court. Petitioners could have requested a remand to the Utah Court of Appeals for full consideration of the issues that had been raised but not considered when that court disposed of the case on jurisdictional grounds. Instead, Petitioners chose to forego that remedy and seek from this Court a ruling in the first instance on these state law questions. Because state court is the proper forum for resolution of state law issues, because the Utah Supreme Court has not ruled on these issues, and because they present no exceptional circumstances warranting review by this Court, the Petition should be denied.

II. The two questions presented concerning the Ute Partition Act are not dispositive of the jurisdictional issue before this Court and have not been ruled upon by the Utah Supreme Court.

Petitioners present two questions related to the proper legal interpretation of the Ute Partition Act: whether the Act expelled the Uintah band from the Ute Indian Tribe; and whether the Act affected non-Utes born prior to its enactment. Pet. i. These questions are not dispositive because the Utah Supreme Court referenced the Ute Partition Act only to explain a secondary ground for holding that Petitioners are not Indian. Because even absent the secondary ground, the primary ground would independently defeat Petitioners' claim of Indian status, certiorari on the two Ute Partition Act questions is not warranted.

To explain its conclusion that Petitioners had failed to establish that they were Indian, the Utah Supreme Court relied on this Court's decision in *Rogers*, articulating the controlling two-part test for determining Indian status. Pet. App. 9-12, ¶¶ 21-26. A person claiming Indian status must satisfy both parts of the test. The first part requires that the claimant establish "a significant degree of Indian blood." *Id.* at 9, ¶ 21. No court has ever held that 1/16 Indian blood, to which Petitioners stipulated, satisfies the first part of the *Rogers* test. *Id.* at 9, ¶ 22.

Because Petitioners did not satisfy the first part and *Rogers* requires that both parts be satisfied, the Utah Supreme Court rejected Petitioners' claim of Indian status.

Moreover, the Petition does not challenge either the applicability of the *Rogers* test or the Utah Supreme Court's ruling that 1/16 Indian blood is insufficient to satisfy the first prong. Petitioners have thereby conceded the correctness of these matters for purposes of certiorari review.

The Utah Supreme Court also offered a secondary rationale for rejecting Petitioners' claim under the first prong of *Rogers*, noting that "[e]ven were we to conclude that 1/16th Indian blood meets the requirement in *Rogers*, defendants would still fail to establish their Indian status." *Id.* at 9, ¶ 23. The Utah Supreme Court explained that because the ancestors through whom Petitioners claimed Indian status were on the Ute Partition Act final termination roll, Petitioners had zero Indian blood for purposes of the *Rogers* blood quantum analysis. *Id.* at 9-10, ¶ 23 (quoting *Von Murdock*, 132 F.3d at 541). Whether Petitioners have zero Indian blood, as the Ute Partition Act teaches, or 1/16 Indian blood, as they themselves stipulated, makes no difference to the outcome of the case. Either way, they are not Indians under *Rogers*. For this reason, certiorari review of issues related to the Ute Partition Act is not warranted.

The Petition ignores *Rogers* entirely. Instead, it focuses on the Court's secondary reference to the Ute Partition Act, seeking to bootstrap issues not addressed by the Utah Supreme Court into a certiorari-worthy stance. However, Petitioners' insistence that they are members of the Uintah band, that the Uintah band exists separately from the Ute Indian Tribe, and that the Ute Partition Act has no effect on their hunting rights are irrelevant to the disposition of the jurisdictional issue. It turns on the *Rogers* test. Because Petitioners stipulated they have no more than 1/16 Indian blood and their Petition does not challenge the *Rogers* test, the inquiry ends. Petitioners are not Indian for purposes of criminal jurisdiction in Indian country. No further analysis is necessary.

III. The decision of the Utah Supreme Court is correct.

The writ should also be denied because the Utah Supreme Court correctly held that the State of Utah has jurisdiction over Petitioners under *Solem*, 465 U.S. at 465 n.2. The court correctly ruled both that Petitioners are not Indian and that hunting is a victimless crime. Neither of these holdings conflicts with decisions of the Tenth Circuit or any other federal court of appeals.

First, as discussed above, the Petition does not challenge the Utah Supreme Court's conclusion that 1/16 Indian blood falls well short of the quantum

required by the first prong of the *Rogers* test. Nor does the Petition cite any cases holding that 1/16 Indian blood is sufficient under *Rogers*. For this reason alone, the Utah Supreme Court correctly rejected Petitioners' claim of Indian status. Having failed one prong of the *Rogers* test, Petitioners cannot prevail in their attempt to establish Indian status.

Although the Utah Supreme Court need not have reached the second *Rogers* prong, having done so, it correctly rejected Petitioners' claim that the Uintah band enjoyed a separate existence from the Ute Indian Tribe, thus according Petitioners the right to hunt without a state permit. Pet. App. 11, ¶ 25. The Tenth Circuit, deciding a claim identical to Petitioners' here, has squarely held that Uintah band members possess no right to hunt and fish independent of the Ute Indian Tribe. *See Von Murdock*, 132 F.3d at 541, *cert. denied*, *Von Murdock v. United States*, 525 U.S. 810 (1998). Without offering a cogent legal rationale for departing from this settled law, Petitioners seek to relitigate the matter and evade federal caselaw that is directly on point. *See also United States v. Felter*, 752 F.2d 1505 (10th Cir. 1985) (and cases cited therein). The Utah Supreme Court properly rejected this attempt.

Second, the Utah Supreme Court correctly held that hunting is a victimless crime and, accordingly, that the Ute Indian Tribe was not the victim of Petitioners'

poaching.[5] Pet. App, 8-9, ¶ 19. Because the Petition for Certiorari does not challenge the ruling that hunting is a victimless crime, the ruling is not subject to further review by this Court. Moreover, the ruling is correct. *See Montana v. United States*, 450 U.S. 544, 563-65 (1981) (tribe lacks a regulatory interest in hunting by non-Indians on land geographically located within Indian country but neither owned nor held in trust for an individual Indian or Indian tribe); *Douglas*, 431 U.S. at 284 (tribe lacks a property interest in the deer because no entity can claim a proprietary property interest in wild animals on the hoof).

Because the decision of the Utah Supreme Court is firmly rooted in a correct interpretation of governing federal law, certiorari should be denied.

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[5] The Ute Indian Tribe itself has never claimed to be a victim. The Tribe has filed amicus curiae briefs on behalf of the State's position in the Utah Court of Appeals, in the Utah Supreme Court, and in this Court.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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**IN THE EIGHTH JUDICIAL DISTRICT COURT
IN AND FOR UINTAH COUNTY,
STATE OF UTAH**

STATE OF UTAH,	:	RULING
Plaintiff,	:	(Filed Sep. 9, 2003)
vs.	:	Case No.: 021800320
RICKIE L. REBER,	:	
Defendant	:	

This matter came before the Court on June 3, 2003 for hearing. At the hearing the parties stipulated that:

1. The Defendant's mother carried 1/8 "Indian Blood", and was named on the Termination Proclamation in 1961.[1]

2. The Defendant's father does not have any "Indian Blood".

3. The Defendant is 15/16 non-Indian by blood and 1/16 Indian by blood.

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[1] In 1954 Congress passed the Ute Termination Act, August 27, 1954, Ch 1009, 68 State [sic] 868, which is now found at 25 U.S.C. 677. "The Termination Proclamation, contemplated by Section 23 of the "Act", 25 U.S.C. Section 677v., was issued and published by the Secretary effective at midnight August 27, 1961. 26 Fed. Reg. 8042." *Affiliated Utes v. United States* 406 U.S. 128 at p 139; see also *United States v. Felter,* 546 F. Supp. 1002 (Utah D.C. 1982), at page p. 1006.

4. The Defendant is not a member of any Indian Tribe recognized as a Tribe by the United States Government.

5. The Defendant is 51 years old. He was born in Roosevelt and lived in Lapoint, Utah until he was 22. He has not lived in Indian Country since he was 22.

6. The Defendant does not now claim to be a member of the "Timpanogos Tribe".

7. The Defendant does not maintain that the permit which he produced when he was first contacted by law enforcement is valid. He does maintain that, at the time, he believed that the permit was valid.

This Court is bound by the decision of the Utah Supreme Court in *State v. Perank,* 858 P.2d 927 and *Hagen v. Utah,* 510 U.S. 399. Each of these cases held that the exterior boundaries of the Uintah Indian Reservation has been diminished and that there is no outer boundary to the reservation. The United States Supreme Court noted: "The operative language of the 1902 Act provided for allocations of reservation land to Indians, and that all the unallotted lands within said reservation shall be restored to the public domain". (At 412) . . . " It follows that when lands so reserved were 'restored' to the public domain – i.e., once again opened to sale or settlement – their previous public use was extinguished" (at 412). The Court then noted that when lands were returned to public domain, this stripped the land of reservation status

(at p412). Finally the Court indicated that "our cases considering operative language of restoration have uniformly equated it with a congressional purpose to terminate reservation status." (at p.413). Finally the Court held: "In light of our precedents, we hold that the restoration of unallotted reservation lands to the public domain evidences a congressional intent with respect to those lands inconsistent with the continuation of reservation status."

Federal law defines Indian Country to include land within: Indian Reservations, dependent Indian Communities, and Indian Allotments. 18 U.S.C. 1151 (a), (b), (c). Federal case law also reserves jurisdiction of crimes which occur within "Indian Country" involving an Indian as a victim to the tribes or the Federal Government. 18 U.S.C. 1152; *Duro v. Reina,* 495 U.S. 676. However, State Courts have jurisdiction to prosecute crimes which occur within Indian Country where the defendant and victim are not Indian. *Williams v. U.S.,* 327 U.S. 711; *State v. Roedl,* 155 P.2d 741 (Utah 1945). Federal Statutes do not define "Indian" for criminal jurisdictional purposes. In *United States v. Rogers,* 45 U.S. (4 How.) 567, 572-73 (1846), the United States Supreme Court suggested two factors to be evaluated in determining who is an Indian: (1) Whether the individual has a significant degree of Indian blood; and (2) Whether the individual has been recognized as an Indian by a tribe, or society of Indians, or by the Federal Government. The Rogers test for determining Indian status has been adopted by the Utah Appellate and Supreme Courts.

State of Utah v. Hagen, 802 P.2d 745, 748 (Ut. App. Ct. 1990); *State of Utah v. Perank,* 858 P.2d 927; 932 (Ut. S. CT., 1992). Until the Utah Supreme Court announces a new standard, this Court is bound by the *Hagen* and *Perank* cases. Therefore, this Court will follow the Rogers test in determining whether the Defendant is an Indian. Any argument that Utah should follow the test announced in *Lapier vs. McCormick,* 986 F.2d 303 should be addressed to the Supreme Court.[2]

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[2] Some have argued that Indian status, for the purposes of determining Federal jurisdiction under section 1152 and 1153 should be based entirely upon membership in a Federally recognized Indian Tribe. This test would allow Indians to make their own determination of "Indian" status. Reliance upon tribal membership would also provide an understandable and workable standard. It would avoid consideration of such subjective and transitory issues as self-concept as being Indian and recognition as being Indian within Indian Society. It further avoids the quagmire encountered in making a determination of "Indian" status based upon Federal recognition. Federal Statutes and Regulations which define "Indian" are inconsistent and confusing. Individuals are defined as "Indian" for some purposes and programs, but are not defined as "Indian" for other purposes and programs. Where an individual comes within some, but not all, federal definitions, where does the Court draw the line in determining "Indian" status. Is it sufficient if an individual meets at least one federal definition; or must he be recognized within "most" definitions; or perhaps he must meet all federal definitions of "Indian". A definition of "Indian" for the purpose of applying section 1152 which relies upon membership in a Federally recognized Indian tribe provide a much more workable standard than the test set forth in *Hagen.* Nevertheless, most courts who have considered this issue have adopted the *Hagen* test.

Federal statutes do not address the issue of who has the burden to prove that a defendant (or victim) is an Indian or that the crime occurred in "Indian Country". The Utah Appellate Court in *Hagen* stated: "The State properly concedes that the prosecution was required to prove jurisdiction, i.e., that defendant was not an Indian, albeit only by a preponderance of evidence." The Hagen Court cited *State v. Sorenson,* 758 P.2d 466, 469-470, as authority for the proposition that the State had the burden of showing that a defendant was not an Indian. However, the issue in *Sorenson* concerned territorial rather than personal jurisdiction. While territorial jurisdiction must be proved by the State by a preponderance of evidence in every criminal case (*State v. Payne,* 892 P.2d 1032) personal jurisdiction is not an element of an offense and need not be proved as such. Moreover, the Court of Appeals has not been consistent in requiring the State prove an individual is not an Indian. In an unpublished opinion (*State v. Lucero,* Case No. 860213 - Ca) a different panel of the Appellate Court held: " . . . Appellant had the burden to persuade the trial Court that he was an 'Indian' within the intended purview of 18 U.S.C. Section 1152-53." More importantly, our Supreme Court has indicated: "On these facts, we conclude that *Perank* carried his burden of factually establishing that he has been 'recognized racially' as a Ute Indian." *Perank* at 933. Given the fact that the *Perank* decision is the most recent appellate decision and that it is the opinion of our Supreme Court, this Court is bound to follow that decision. Therefore, although the State bears the

burden of showing that the offense occurred within the boundaries of the State of Utah and Uintah County, the defendant has the burden to show, by a preponderance of evidence, that he is an "Indian" under the *Rogers* test.

Placing the burden on the defendant is consistent with what two Courts have characterized as the majority position of courts which have addressed the issue. *Arizona v. Verdugo,* 901 P.2d 1165, 1168 (1995 Ariz. App. Ct.); *Vermont v. St. Francis,* 563 A.2d 249. This is consistent with case law in: *Arizona (Verdugo): Vermont (St Francis); New Mexico* (*State of New Mexico v. Cutnose,* 532 P.2d 896, (N.M. App. 1974)); Nevada (*State of Nevada v. Jack,* 96 p.497 (1908)); *Pendleton v. Sate* [sic] *of Nevada* 734 P.2d 693 (1987); Oklahoma (*State of Oklahoma v. Klindt,* 782 P.2d 401, (Okla. Crim. App. 1989); Washington (*State of Washington v. Daniels,* 16 P.3d 650) and with sound public policy. " . . . the general rule is that the State has subject matter jurisdiction to prosecute crimes within its territorial border. . . . As an exception to that general rule, however, the Indian Country Crimes Act preempts State Court jurisdiction over a criminal prosecution when an offense involving an Indian occurs on Indian land . . . The federal statute is silent, however, on the issue of who bears the burden of proof to establish these jurisdictional facts." *Verdugo* at 1167. The Arizona Appellate Court then noted that while the State bears the burden to show the offense occurred within State boundaries, the elements of a criminal offense do not require the State to prove that

the crime did not involve an Indian. The Court notes that to require the State to prove that the defendant and the victim were not Indian would place " . . . the state . . . in a position of having to prove the nonoccurence of events which might deprive it of jurisdiction." (*Verdugo* at 1168). The court went on to note: "If we were to place this burden on the state, the state would be compelled to allege . . . every conceivable exception to State Court jurisdiction." (*Verdugo* at 1168). Not only would the state be required to allege every exception to jurisdiction, the state would have the affirmative burden to prove that the exception did not apply.

Wigmore suggest [sic] that in determining who should bear the burden of proof it is appropriate to consider that it is difficult to prove the nonexistence of a fact and it is appropriate to place the burden on the party who presumably has particular means of knowledge.) *Wigmore,* Evidence in Trials at Common Law §2486 (1981). It is therefore relevant that there are over three hundred Indian Tribes which have been recognized by the Federal Government. Membership in any one of these tribes would be sufficient to meet the second test as set forth in *Rogers* (i.e. that the individual has been recognized as an Indian by a tribe, or society of Indians, or by the Federal Government). In addition to Federally recognized tribes there are many more Indian groups or societies of Indians which may form the basis to establish the second test in *Rogers.* It would therefore be virtually impossible for the state to prove that a particular

individual was not a member of any of the possible tribes and Indian societies throughout the United States. Additionally, in many cases it would be impossible to prove that a particular person did not have a significant degree of Indian blood (which is the first test under *Rogers*). While it may be possible to determine the identity of a defendant's parents it may be impossible to prove that the parents do not have Indian blood. In the case of adopted persons, it would often be impossible to determine that the biological parents were not Indian. This becomes even more difficult as you consider whether grandparents and great grandparents (who may be deceased) have Indian blood. All of this is complicated by the liberal interpretation courts have given to the term significant degree of Indian blood. Generally twenty-five percent is considered substantial. It is obvious that, the information which is relevant to a defendant's blood lines as well as his or her associations with Indian Tribes and societies, is uniquely within the knowledge of the Defendant and is usually readily available to the Defendant, while such information is often unavailable to the State.

One must also remember that under 1151 the state is deprived of jurisdiction when a victim is an Indian. If the state bears the burden of proof, the state must show that each victim in every case is not an Indian. In most cases this could be easily accomplished by asking the victim a few simple questions during trial. However, not all victims are available to be examined at trial. Victims move and sometimes

can not be located. Victims may die prior to trial. By definition, a victim in a homicide would never be available to testify concerning their blood lines or association with Indian Tribes and societies. Because Indian status may depend on association with Indian tribes, culture, and society, it would often be difficult to prove that a victim who is not present at trial was not an Indian. Occasionally, it is not possible for the State to even identify the victim by name. (One of the cases cited above (*Jack*) involved a victim of a homicide who was "commonly known by the name 'Lotta', whose real name was to the grand jury unknown." (P 497). If the State were required to prove that it has jurisdiction by disproving Indian status of each victim, there would be certain cases where the victim's status as an [sic] non-Indian could never be proved. By placing the burden on the State, this Court would be depriving the State of jurisdiction merely because the State has no access to the kind of information necessary to prove Indian status under *Rogers*.

Considering all of the circumstances and public policy the burden is properly placed upon the defendant to show an exception to state jurisdiction by establishing a preponderance of the evidence that the defendant or victim has a significant degree of Indian blood and has been recognized as an Indian by an Indian Tribe, or society of Indians, or by the Federal Government.

DATED this 9 day of Sept, 2003.

BY THE COURT:

/S/
A. LYNN PAYNE,
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that on the 9th day of ~~June~~ September, 2003, true and correct copies of the Ruling were mailed, postage prepaid, or hand delivered to: Mr. Edwin T. Peterson, Deputy Uintah County Attorney, at 152 E. 100 N., Vernal, UT 84078 and to Mr. Michael L. Humiston, Attorney for Defendant, at 23 W. Center Street, P.O. Box 486, Heber City, UT 84032.

/S/
Deputy Clerk

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Attorney for Plaintiff
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Vernal, Utah 84075
Telephone: (435) 781-5428

IN THE DISTRICT COURT FOR THE
EIGHTH JUDICIAL DISTRICT
IN AND FOR UINTAH COUNTY, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, vs. RICKIE L. REBER, Defendant.	**MODIFIED FINDINGS OF FACT AND CONCLUSIONS OF LAW** (Filed Jan 29, 2004) Case No. 021800320 Judge A. Lynn Payne

The Court, having previously entered written findings on this matter, adopts those findings herein and makes further findings of fact and conclusions of law, based upon the stipulations of the parties as follows:

1. Defendant Rickie L. Reber is charged with "aiding or assisting in the wanton destruction of protected wildlife", a third degree felony, for allegedly assisting his son in taking a trophy buck deer without the appropriate permit from the area

known as the "Book Cliffs" in southern Uintah County. Mr. Reber initially moved to dismiss the criminal charges claiming to be a member of the "Timpanogos Tribe" of Indians and that the area the alleged act occurred was in "Indian Country". Mr. Reber, in the course of the litigation, abandoned his claim to be a member of the "Timpanogos Tribe", affirmatively alleging that he is a member of the "Uintah Band", and is of either Shoshone or Ute decent.

2. Defendant Steven Paul Thunehorst is charged with "aiding or assisting in the wanton destruction of protected wildlife", a class "A" misdemeanor, for allegedly assisting or taking a buck deer without the appropriate permit from the area known as the "White Rocks Canyon" in the National Forest in Northwestern Uintah County. Mr. Thunehorst initially moved to dismiss the criminal charges claiming to be a member of the "Timpanogos Tribe" of Indians and that the area the alleged act occurred in was "Indian Country". Mr. Thunehorst, in the course of the litigation, abandoned his claim to be a member of the "Timpanogos Tribe", affirmatively alleging that he is a member of the "Uintah Band", and is of either Shoshone or Ute decent.

3. Defendant Tex William Atkins is charged with "aiding or assisting in the wanton

destruction of protected wildlife", a class "A" misdemeanor, for allegedly assisting or taking a buck deer without the appropriate permit from the area known as the "White Rocks Canyon" in the National Forest in Northwestern Uintah county. Mr. Atkins initially moved to dismiss the criminal charges claiming to be a member of the "Timpanogos Tribe" of Indians and that the area the alleged act occurred in was "Indian Country". Mr. Atkins, in the course of the litigation, abandoned his claim to be a member of the "Timpanogos Tribe", affirmatively alleging that he is a member of the "Uintah Band", and is of either Shoshone or Ute decent.

4. With respect to Mr. Reber, it was stipulated by the parties that he claimed to be 1/16th Indian by blood, from his mother. With respect to Mr. Thunhorst [sic] and Mr. Atkins it was stipulated by the parties that they claim to be 1/16th Indian by blood, from their grandmother. Mr. Reber's mother, and the grandmother of Mr. Thunhorst [sic] and Mr. Atkins, were listed on the termination proclamation. Their status as Indians was therefore terminated by the Ute Partition act of 1954, 25 U.S.C. sec. 677 et seq. (Hereinafter the "UPA"). Mr. Thunhorst [sic] and Mr. Atkins may have a grandparent who had Indian blood but was not a member of a tribe which was recognized by the United States Dept. of Interior,

Bureau of Indian Affairs as an Indian entity, and eligible to receive services from the Bureau of Indian affairs by virtue of their status as Indian tribe. Mr. Thunehorst and Mr. Atkins have not produced evidence of the heritage of this person.

5. Mr. Reber, Mr. Thunhorst [sic] and Mr. Atkins are not members of any Indian tribe recognized by the United States Dept. of Interior, Bureau of Indian Affairs as an Indian entity, and eligible to receive services from the Bureau of Indian affairs by virtue of their status as Indian tribe.

6. Mr. Reber is 51 years old, or was at the time of this Courts last ruling.

7. Mr. Reber was born in Roosevelt Utah and lived in Lapoint Utah until he was 22.

8. Mr. Reber has not lived on or near the Ute Indian Reservation since he was 22.

9. Mr. Reber does not now claim to be a member of the Timpanogos tribe.

10. Mr. Reber, Mr. Thunehorst, and Mr. Atkins do not now maintain that the permit that they produced when they were contacted by law enforcement was valid, but do maintain that they believed the permit was valid at the time of the alleged violations.

11. Mr. Reber, Mr. Thunehorst, and Mr. Atkins claim to be members of the "Uintah Band" and that is the only group that they claim to be associated with. They all maintain that they are Indians of Utah Territory. They do not claim to be members of the Ute Indian tribe, or of the Uintah band of the Ute Indian Tribe which is one of the three constituent bands which comprise the Ute Indian Tribe.

12. Mr. Reber was alive in 1961. Mr. Thunhorst [sic] and Mr. Atkins were born after 1961, however Mr. Thunhorst's [sic] and Mr. Atkin's [sic] mothers, who were sisters, were alive at the time of the termination proclamation in 1961.

The Court makes the following conclusions of law.

With respect to Mr. Reber, Mr. Thunhorst [sic] and Mr. Atkins, even if the court were to not consider the issue of the UPA, 25 U.S.C. §§ 677 *et seq.*, they do not have significant blood quantum under the first prong of the two part analysis stated in *United States v. Rogers,* 45 U.S. (4 How.) 567, 572-73 (1846), which was adopted by the Utah Supreme Court in *State v. Perank,* 858 P.2d 927, 931 (Utah 1992) to be considered an Indian. The Court can find no benefit which is available base [sic] upon Indian blood quantum of 1/16th. Therefore for the purpose of qualifying for Federal programs or recognition they do not qualify based on their quantum of blood. When describing a person as having 1/16 Indian Blood one must realize that necessarily means that same person is 15/16 non

Indian. That means that he has 6¼% Indian blood and 93 3/4 non Indian blood. This percentage of blood is simply not high enough to meet the first prong of the *Rogers* Test. The Court has found no Federal or State case which determined a percentage of Indian blood as low as 6.25% to be significant under the *Rogers* Test. There is judicial precedence, *Vialpando vs. Wyoming*. 640 P.2d 77, that 12½% was not substantial under the Rogers Test. Other case [sic] have held that 12½% is substantial. This Court is unaware of any case which has gone below 12½%. The case that held 12½% was substantial is *Sully vs. United States* 195 Fed. 2d. 113 which was issued by the 8th Circuit and is an old case.

Even if Mr. Reber, Mr. Thunhorst [sic] and Mr. Atkin's blood quantum was of a significant amount, the Court finds that the UPA terminated their status as an Indian for the purpose of criminal jurisdiction. Congress has the plenary power to legislate for Indian tribes in all matters. An individuals status as Indian for jurisdictional purposes is subject to the power of Congress to allocate jurisdiction between the State, Tribes, and the Federal Government. Congress clearly has the unilateral power to grant the State jurisdictions over persons who are Indian. The statute in this case (Ute Partition Act, 25 U.S.C. §§ 677 *et seq.*) says that upon termination, all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to such member over which supervision was terminated and the laws of the several States shall apply to such

member in the same manner as they apply to other citizens within their jurisdiction. That provision clearly grants to the State jurisdiction over all persons who are listed in the termination proclamation which would include Mr. Reber's Mother and Mr. Thunhorst [sic] and Mr. Atkins grandmother. Therefore, for the purpose of determining jurisdiction, Mr. Reber's Mother and Mr. Thunhorst [sic] and Mr. Atkins grandmother are no longer considered to be Indian. The natural consequence of termination of these ancestors as Indian is that each of the Defendant's [sic] would not be considered to have received any Indian blood from, in Mr. Reber's case, his mother and in Mr. Atkins and Mr. Thunhorst [sic] case, their grandmother.

The Court does not believe that Congress intended to terminate an ancestors status as Indian only to continue that relationship with their decedents.

For the purpose of determining jurisdiction under *Rogers* Mr. Reber, does not have any Indian blood coming through his mother and since this is the only Indian blood which he claims, he does not have any Indian blood for the purposes of the *Rogers* analysis. As for Mr. Thunhorst [sic] and Mr. Atkins they also have no Indian blood coming from their maternal grandmother. The conclusion of this Court is based upon the conclusions of the Federal Court in the *Felter* case, *U.S. v. Orrana B. Felter,* 546 F.Supp. 1002 (D.C. 1982), *aff'd* 752 F.2d 1505 (10th Cir 1985) and the Utah Appellate Court in the *Gardner* case *State v. Gardner,* 827 P.2d 980 (Utah App. 1992).

Mr. Reber, Mr. Thunhorst [sic] and Mr. Atkins argue that in spite of the termination of their ancestors Indian status, they have not been affected by the UPA; because in Mr. Rebers case he, and in Mr. Thunhorst [sic] and Mr. Atkins' case their mother was alive at the time of the UPA. The absence of the [sic] Mr. Thunhorst [sic] and Mr. Atkins' mother's name, or in Mr. Rebers case his name on the termination proclamation is not relevant to this inquiry. It only reflects that at the time of the termination act, Mr. Reber and the mothers of Mr. Thunhorst [sic] and Mr. Atkins, were not enrolled members of the Ute Tribe, and therefore could not be an individual who could receive tribal benefits. Because these individuals were not tribal members they could not have been listed on the termination proclamation. Nevertheless, their immediate ancestors were members of the tribe whose Indian Status was terminated.

It is clear to the Court that by 1950 all relevant Indian hunting and fishing rights were vested in the Ute Indian tribe. No individual had a right to those hunting and fishing rights except through the tribe, and through membership in the tribe. Again it is evident to the Court that Congress did not intend to terminate Mr. Reber's mothers status as and [sic] Indian and Mr. Thunhorst [sic] and Mr. Atkins grandmother's status as an Indian, only to recognize their children and grandchildren to have Indian hunting rights based upon Indian heritage which was Congressionally terminated. The argument that they were not among the 490 individuals listed in the UPA

is therefore without merit. One is either a member or not. Whether or not they were eligible to be an individual who was entitled to membership is not the issue. Before this Court can take note of any privilege which is based upon tribal membership, that person must apply for and be granted membership by the tribe. There is no evidence in this case that Mr. Reber Mr. Thunhorst [sic] or Mr. Atkins have ever applied for or been granted membership by the Ute Indian Tribe. And there is no indication that Mr. Thunhorst [sic], Mr. Reber or Mr. Atkins has been granted any other tribal membership.

It would be inappropriate for the Court to extend any privilege which is available only through membership when the tribe has never granted those privileges through membership. Even if a Defendant may have once been eligible for membership that would not be relevant. You either are a tribal member or you're not. If you are eligible you need to apply and be granted those privileges. The Court was further convinced after reading Judge Jenkins opinion in *Felter* which was the basis for the *Murdock* decision, *U.S. v. Murdock,* 123 F.3d 534 (10th Cir. 1997), that there is a connection. The Court finds that all of those rights are vested in the Tribe. A members interest in that tribal property is personal and cannot be transferred or inherited. It is true that those 490 persons who were terminated under the UPA continue to have hunting and fishing rights it is not true that their heirs would continue to claim any interest in tribal

property in their own right if they were not given the privileges of tribal membership. The rights of the terminated Utes to hunt and fish was not their personal property right and would be extinguished with their death and is not transferrable or inheritable. The children of persons listed on the Termination Proclamation are not entitled through their parents to enjoy hunting and fishing privileges. There was a foot note [sic] I think from the *Murdock* case, citing Judge Jenkins opinion in the *Felter* case, and I'm going to paraphrase that. In essence he said, those who are terminated Utes are readily identified and that their rights can be ascertained and that attrition would eventually extinguish the rights that they have because those rights are not inheritable or transferable and ultimately those rights would end.

The Court finds that Mr. Reber does not have, independent of the Termination Act, sufficient blood quantum to qualify for an Indian under the *Rogers* Test. I believe for purposes considering the Termination Act considering the *Rogers* Test he has no Indian blood. Mr. Reber does not and can not have any hunting or fishing rights that come through his mother, because they have been terminated and they are not transferrable [sic] even though he was alive at the time of the Termination Act. Mr. Reber rights must be connected to the tribe who were the ones who had the hunting and fishing rights. With respect to Mr. Thunhorst [sic] and Mr. Atkins the Court will not consider, for purpose of analysis, the Indian blood coming through their Maternal Grandmother. The

same analysis will apply with respect to whether or not they receive any hunting or fishing rights from their Maternal Grandmother. Because the Court has found that no Defendant has sufficient blood quantum to satisfy the first prong of the *Rodgers* [sic] decision the Court need not inquire as to the second.

All Motions with respect to claims that the Court does not have jurisdiction which are based upon claims that the defendants are Indians are denied. The Court has jurisdiction to hear the criminal cases which have been filed.

Dated this 27 day of January 2004.

BY THE COURT:

/S/

A. Lynn Payne
Eighth District Court Judge

CERTIFICATE OF DELIVERY

I do hereby certify that I delivered by US Mail, postage prepaid, a true and correct copy of the foregoing MODIFIED FINDINGS OF FACT AND CONCLUSIONS OF LAW to Michael L. Humiston Attorney for Defendant, 23 West Center Street P.O. Box 486 Heber City, Utah 84032, on this 22nd day of January, 2004.

/S/